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NO. 84-402

in the Supreme Court of the United States

October Term, 1984

EMANUEL BARSHOV AND
JAMES E. ROSS,

Petitioners

vs.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITIONERS' RULE 22.5 REPLY BRIEF

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This Reply Brief addresses two arguments first raised in the Memorandum for the United States in Opposition (*Gov't*). First, the government argues that in the context of certain evidence, "[t]he prosecutor's argument – that

this pattern could not have been coincidental and must have been the product of intention and design—was clearly proper." *Gov't.* at 8. The government maintains that it was established in evidence ". . . that Petitioners had knowingly assigned inflated values to the films and thus fraudulently increased the films' tax bases for depreciation and investment credit purposes," *id.* at 6, that the Petitioners' estimates of projected revenue for purposes of the income forecast method of depreciation were unreasonable estimates, *id.* at 7-8, and that the Petitioners falsified income on two of its eight movies for tax year 1975. *Id.* Petitioners submit that the evidence did not establish what the government maintains, and in any event cannot render fair the prosecutor's argument.

Second, the government argues that the question of whether the prosecutor improperly referred to the IRS's civil disallowance of NAP's and PAN's deductions is not presented to this Court as a question for review. *Id.* at 8 n.3. Petitioners submit that they do present this question for review to this Court.

1. **The Evidence Cannot Justify the Prosecutor's Reference to the Safe Harbor Civil Tax Requlation**

   A. **The Prosecution Misled the Jury That the Petitioners' Compliance With the Safe Harbor Civil Regulation Was an Intent to Perpetrate a "Criminal Design."**

The government urges this Court to hold that it was fair for the prosecutor to argue that ". . . the consistent pattern of 93.99% accumulated depreciation was 'too extraordinary a coincidence' to be mere

happenstance," *id.* at 6, and therefore ". . . this pattern showed that Petitioners had fraudulently manipulated the income forecast method to maximize depreciation deductions yet maintain the desired level of investment credit, and had thus 'used the law to their advantage to defraud the [g]overnment.' " *Gov't.* at 6.

However, the premise of this argument, i.e., that the percentage amount and consistency of depreciation deductions on motion pictures are *coincidental*, was false. Indeed, the safe harbor civil tax regulation in question required the taxpayer to reasonably "manufacture" the denominator of the income forecast fraction (i.e., to *reasonably estimate* projected income of films) so as to fall within the imposed 94% percentage limitation of depreciation applicable to all of the motion pictures lest the taxpayer be penalized with respect to any motion picture for which the depreciation deduction exceeded the 94% limitation. Petitioners submit that the government should not have knowingly misled the jury to believe that the percentage amount and consistency of depreciation of motion pictures was a matter of chance, or "mere happenstance," for the purpose of proving that Petitioners manufactured a "criminal design," when in fact legislative committee reports and IRS regulations required the taxpayer to "manufacture" the amount of depreciation deductions within a percentage limitation applicable to all of the motion pictures in order to keep investment credits which were elected at NAP's and PAN's inception.

Nor does the record in this case establish that the Petitioners knowingly, or in fact, overvalued any films[1]

[1]The allegation of overvaluing was not even contained in the Indictment.

or provided false income or unreasonable estimates of projected income for purposes of the income forecast fraction so as to render the prosecutorial reference fair. It was because of this lack of evidence that the government's prosecutor resorted to the falsely-premised argument that the consistent pattern of 93.99% accumulated depreciation was "too extraordinary a coincidence."

B. The Income Forecasts Were Reasonable

The record fully supports that the estimates of the films' future incomes (which comprise the denominator of the income forecast fraction) were reasonable, *Gov't.* at 8, because the government's own witness testified that the income forecasts *were within the range of acceptable forecasts. Tr.* at 188-89, 199. This was the only evidence as to the reasonableness of the income forecasts. Therefore, the evidence proved that those projections were reasonable.

The government concedes that the safe harbor regulation ". . . *permitted* [the petitioners] to depreciate the films up to 94% of basis . . . ." *Gov't.* at 7. Since the projected range of future income was reasonable and generated a deduction within a range which encompassed 94%, *Gov't. Exhibit* 57, the taxpayers were entitled to depreciate PAN's films up to 93.99% in compliance with the safe harbor regulation.

C. The Petitioners Did Not Overvalue The Films

With respect to the PAN partnership, the government states that Lang[2] purchased four films from another party for $375,000, and then sold the same four films to PAN for $2.89 million, *Gov't.* at 4, which PAN "considered" that it had paid for the films. *Id.* However, Lang testified that he and Mr. Barshov had arms-length negotiations between themselves for the amount of cash and notes[3] to be paid by PAN to Freedom Records. *Tr.* at 269, 266, 265-68. Lang would not tell Barshov what Freedom Records had paid for the PAN movies even though Barshov's agent-attorney asked Lang what he had paid, *id.* at 720, and so Lang instead provided Barshov and his agents with certified costs of production and certified box office grosses which established that the terms of the sale were fair and realistic. *Id.* at 265-66. See Defendant's Exhibits 13-16.

With respect to the NAP films, the government states that the seller's agent testified that there were no price negotiations over these films, *Gov't.* at 4 n.1, and that NAP purchased one of those films for $1.35 million for which Lang had previously negotiated to purchase for $450,000 and had told Petitioners a few days before NAP purchased it that he could have bought it for $150,000. *Id.* The record does not support the government's assertion that the seller's agent testified that there were no price negotiations over NAP's films.

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[2]Actually, it was Lang's company, Freedom Records, Inc., which made the purchase.

[3]Pre-1976 law allowed the use of nonrecourse notes. *Tr.* at 686.

The seller's agent testified that "[t]he deal was proposed to me at the time" by Lang, *Tr.* at 315, because the seller (which had also sold to PAN through Freedom Records) found out that Freedom Records had resold the films to PAN for cash and the non-recourse notes and so the seller sold directly to NAP itself this time because the seller wanted the non-recourse notes. *Tr.* at 289. In fact, the seller almost fired its agent because he did not get the non-recourse notes from PAN. *Id.*

The record does not support the government's assertion that Lang had told Petitioners a few days before NAP purchased that he could have bought one film for $150,000. Nothing exists in the record citations provided by the government, *Gov't.* at 4 n.1, or anywhere else in the record, that Lang told the Petitioners a few days before NAP purchased a film that he could have bought it for $150,000.

Although the record does support the government's assertion that Lang had previously negotiated to purchase a NAP film himself for $450,000, Lang testified as to why the price that the Petitioners paid was fair market value. The $450,000 price negotiated by Lang was nine months before NAP purchased it and was set by an option and was upon different and more favorable terms to the seller than the price that NAP paid. *Tr.* at 519-22. What Lang told Petitioners a few days before NAP purchased it was that the film ". . . if handled and marketed properly, is worth several million dollars," and ". . . the firm price which was being arrived at being one million three hundred thousand dollars, I felt was fair, because it was my burden to obtain a good and proper distributor. . . ." *Id.* at 521-22. Indeed, Lang testified that this film was "re-negotiated." *Id.* at 242.

D. Evidence of False Playdates

Although the record supports the government's assertion that the distributor testified that Barshov or Ross[4] asked him to revise a report for each of two films to show "a small amount of activity," *Gov't.* at 5, it is also true that the record supported the Petitioners' assertion that the distributor had falsified the playdates without the Petitioners' knowledge, and was lying to protect himself from civil and criminal liability because the distributor was contractually obligated to the Petitioners to get a guaranteed number of playdates per year for all the movies, *Tr.* at 174-75, was granted immunity in exchange for his testimony, *id.* at 194, and was aware that he was under a current investigation by the Tax Division of the Department of Justice for omitting gross income on his own return about which he had refused to testify at a grand jury. *Id.* at 195-98. The Petitioners were not convicted for falsifying income of two movies for the tax year 1975, they were convicted for perpetrating a "criminal design" because the percentage amounts of the depreciation deductions of all four PAN movies were 93.99%, "too extraordinary a coincidence." In ". . . a case that could have been decided either way," *Tr.* (sentencing) at 3 (district judge speaking), the prosecutor's misleading reference to the safe harbor regulation convinced the jury to convict Petitioners for their lawful and required action of complying with the safe harbor limitations of the IRS regulations for all three tax years, 1973-75.

[4]The distributor testified that he could not remember which one he had talked to. *Tr.* at 179.

E. Conclusion

Petitioners submit that their convictions were based upon their lawful acts in conformity with a "safe harbor" civil tax regulation referred to by the prosecutor to prove a "criminal design," in combination with another reference to the IRS's disallowance of deductions where no evidence of such was introduced which reflected government disapproval of Petitioner's safe harbor acts. This deprived Petitioners of a fair trial.

2. Petitioners Have Presented for Review The Improper Prosecutorial Reference To The IRS's Civil Disallowance Of NAP and PAN Deductions

The government asserts that the Petitioners have not presented as a question for review that the prosecutor improperly referred to the IRS's civil disallowance of NAP's and PAN's partnerships deductions. *Gov't.* at 8.

"This Petition seeks review of a Court of Appeals opinion affirming a District Court decision denying a motion for mistrial made after the government's closing argument in which it sought to have the jury draw inferences of the defendant's[5] criminal intent by reference to the defendant's acts in conformity with a "safe harbor" civil tax regulation to prove a criminal design, in combination with a reference to the IRS's disallowance of certain deductions where no evidence of such was introduced." PET. at 1. The Petitioners have also stated in their Petition the facts at trial which they allege to be the prejudicial reference to the IRS's statutory

[5]When filed, the Petition for Writ of Certiorari applied only to Ross. Barshov timely joined the Petition later.

notice of deficiency. PET. at 5-6. The Petitioners submitted that the prosecutor's reference to the IRS's civil disallowance of deductions combined with the prosecutorial reference to the safe harbor regulation so as to deprive them of a fair trial and come within the rule of law enunciated in *United States v. Frade*, 709 F.2d 1397, 1392 (11th Cir. 1983). PET. at 7, 8. Therefore, Petitioners submit that the question of whether the prosecutor improperly referred to the IRS's civil disallowance of NAP's and PAN's deductions is presented to this Court for review.

3. **Conclusion**

For the special and important reason given in the Petition for Writ of Certiorari, certiorari should be granted.

Respectfully submitted,

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